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No. 81-1843

In the

# Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

*Petitioner,*

*vs.*

JOHN ANDREAS,

*Respondent.*

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District.

## REPLY BRIEF FOR PETITIONER

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# INDEX


PAGE

Table of Authorities ..... i

Argument ..... 2

Respondent Had No Protected Fourth Amendment Interest In A Package Containing Contraband That Had Been Seized And Examined During A Lawful Customs Inspection And Then Delivered To Respondent By Law Enforcement Agents Under Controlled Conditions, And Then Retaken By Them From Respondent After He Moved The Package From Inside His Apartment Into The Hallway Of His Apartment Building. .. 2

Conclusion ..... 14


## TABLE OF AUTHORITIES


CASES: PAGE

*Arkansas* v. *Sanders*, 442 U.S. 753 (1979) ..... 3, 4

*Chambers* v. *Maroney*, 399 U.S. 42 (1970) ..... 8

*Chapman* v. *United States*, 443 F.2d 917 (10th Cir. 1971) ..... 6

*Chimel* v. *California*, 395 U.S. 752 (1969) ..... 4

*McConnell* v. *State*, 595 P.2d 147 (Alaska 1979), cert. *denied*, 444 U.S. 918 (1979) ..... 6, 7

*Michigan* v. *Tyler*, 436 U.S. 499 (1978) ..... 8

*Payton* v. *New York*, 445 U.S. 573 (1980) ..... 11

*Rakas* v. *Illinois*, 439 U.S. 128 (1978) ..... 3

*Rawlings* v. *Kentucky*, 448 U.S. 98 (1980) ..... 3

*United States* v. *Chandwick*, 433 U.S. 1 (1977) ....3, 4, 11, 12

*United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973) 6, 7

CASES: PAGE

*United States* v. *Edwards*, 415 U.S. 800 (1974) ..... 8

*United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979) ..... 10

*United States* v. *Johnson*, 572 F.2d 227 (9th Cir. 1978), cert. denied, 437 U.S. 907 (1978) ..... 12

*United States* v. *Pringle*, 576 F.2d 1114 (5th Cir. 1978) ..... 8

*United States* v. *Pryba*, 502 F.2d 391 (D.C. Cir. 1974) 11

*United States* v. *Ramsey*, 431 U.S. 606 (1977) .....3, 12

*United States* v. *Ross*, ..... U.S. ....., 102 S.Ct. 2157 (1982) ..... 2, 3

*United States* v. *Ventresca*, 380 U.S. 102 (1965) ..... 6

*United States* v. *Washington*, 586 F.2d 1147 (7th Cir. 1978) ..... 9

*Whiteley* v. *Warden*, 401 U.S. 560 (1971) ..... 6

STATUTES:

Ill. Rev. Stat. 1979, ch. 56½, sec. 704(e), sec. 705(e) .. 10

19 U.S.C. sec. 1582 ..... 3

21 U.S.C. sec. 881(a)(1)(2)(3) and (f) ..... 12

19 C.F.R. sec. 162.6 ..... 3

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# REPLY BRIEF FOR PETITIONER

## ARGUMENT

**RESPONDENT HAD NO PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE CONTAINING CONTRABAND THAT HAD BEEN SEIZED AND EXAMINED DURING A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO RESPONDENT BY LAW ENFORCEMENT AGENTS UNDER CONTROLLED CONDITIONS, AND THEN RETAKEN BY THEM FROM RESPONDENT AFTER HE MOVED THE PACKAGE FROM INSIDE HIS APARTMENT INTO THE HALLWAY OF HIS APARTMENT BUILDING.**

The issue in this case remains whether the respondent consignee had any protected fourth amendment interest in a package that had been subjected to a lawful customs inspection and was thereafter delivered to respondent under controlled conditions after the discovery that the package contained contraband. Petitioner has argued that respondent had no legitimate expectation of privacy in the contents of the package because any package shipped across the border is subject to being "searched at random." *United States* v. *Ross*, ..... U.S. ....., 102 S.Ct. 2157, 2171 (1982). Therefore, respondent had no protected fourth amendment interest in the package, and no warrant was required to reopen the package after it was delivered to respondent by law enforcement officials under controlled conditions. Respondent has failed to address the fundamental principles of fourth amendment jurisprudence that underlie the petitioner's argument.

In response to petitioner's argument that he had no expectation of privacy in the package, respondent mistakenly equates the package in the instant case to the

double locked footlocker in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and the suitcase in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and claims that his "Fourth Amendment standing [is] no different than the standing of the parties in *Chadwick* or *Sanders*." (Resp. Br. 7) This argument simply ignores the facts of the instant case. There is a difference of constitutional dimension between the expectations of privacy in *Chadwick* and *Sanders*, and the lack of expectation of privacy in the case at bar. In both *Sanders* and *Chadwick* the respondents manifested an expectation that the contents of their respective packages would remain free from examination by government officials. Neither Chadwick nor Sanders had sent his package across the border where it was subject to being examined and lawfully "searched at random" by customs officials. *United States* v. *Ross*, *supra*, at 2171. In contrast, when respondent arranged for the contraband to be sent to him from India through an international air cargo carrier, he manifested a specific recognition that the package could be the object of a lawful customs inspection. 19 U.S.C. sec. 1582; 19 C.F.R., sec. 162.6. In fact, respondent concedes that the search of the package at customs was proper. (Resp. Br. at 7) This Court has never suggested that an individual has a constitutionally protected expectation of privacy in a package when, by his own actions, that person causes the contents of his package to be exposed to examination by government officials. *See, United States* v. *Ramsey*, 431 U.S. 606 (1977). Such a suggestion is contrary to this Court's express determination in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), that the fourth amendment protects only legitimate expectations of privacy, not mere subjective expectations.

Respondent's confusion over the constitutional distinction between a subjective and a legitimate expectation of privacy prompts him to suggest that the container having been seized, "it was unreasonable to undertake the additional and greater intrusion of a search [at Chicago Police Headquarters] without a warrant.' *Chadwick* at 13" (Resp. Br. 6). The prior lawful customs inspection of the package prevented it from being a package subject to the rules of *Chadwick* and *Sanders*. The package being placed on an international air cargo carrier and consigned to a location within the United States, alone, made the package subject to lawful customs inspection. Therefore, respondent had no legitimate expectation of privacy in the package, and the subsequent retaking and reopening of the package therefore did not violate any fourth amendment right of respondent. Indeed, the subsequent reopening of the package at Police Headquarters was not the type of 'intrusion" contemplated by *Chadwick* at all because the package had already been lawfully opened at customs, and had been the subject of a controlled delivery to respondent. Rather, as recognized by the majority of courts to address this issue, the subsequent retaking and reopening of the package, following the controlled delivery, is merely the government's reassertion of actual physical possession over the package. (See Pet. Br. at 17-19) Furthermore, in this case, it is apparent that Labek had probable cause to arrest defendant when he saw defendant push the container into the hall. The seizure of the container was incident to arrest. *Chimel* v. *California*, 395 U.S. 752 (1969).

Respondent claims that "there was no 'controlled delivery' in this case." (Resp. Br. 13) He states that "[n]o evidence of continuity of seizure of the contents of the package was shown between the February 21 opening [at customs] and the time Labek picked up the already sealed package on February 22." (Resp. Br. 13) The facts belie respondent's contention. When the container was first opened by customs agents, they drilled several holes into the table top it contained and obtained a substance from within the table top which field tested positively for the presence of marijuana. On February 21, 1979, Agent Labek performed a "marquis" test on the substance, which had been extracted from the table top. (R. 25-26) The test demonstrated a positive reaction for the presence of marijuana. Agent Labek observed the metal container which was approximately four feet square and ten inches in depth. United States Customs agents informed Agent Labek that they had removed a table from the container. Agent Labek observed the table and described it as being round, dark in color, made of wood and being seven inches thick. It was heavily coated with laquer and gave off a deep shine. (R. 26-27) When Agent Labek next saw the package on February 22, 1979, the metal container had been resealed by customs agents.

It is clear that all of the actions regarding the container and the table from the time it came into customs custody until it left customs under Agent Labek's control were actions taken by law enforcement officials. All actions taken with respect to the table were within Labek's knowledge. It is immaterial whether Agent Labek actually viewed the resealing of the package. This Court

has long recognized that when law enforcement officers are working together, the knowledge of one officer is the knoweldge of all. *See*: *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971); *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965).[1]

Courts have consistently held that it is certainly permissible to allow contraband to reach its destination even if doing so takes a period of time and even if the contraband is shipped from place to place on the way to the intended destination. In *Chapman* v. *United States*, 443 F.2d 917 (10th Cir. 1971), a package containing contraband was inspected by customs in New York and then resealed and sent to Denver. The package was reopened by the Postal Inspector in Denver and then delivered to the defendant's home. Similarly, in *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973), a Los Angeles air freight supervisor opened a suitcase containing contraband. He notified the Los Angeles police, who resealed the bag and shipped it to New York. The bag was kept under surveillance by New York authorities who did not reinspect the contents before the defendant picked up the bag. In *McConnell* v. *State*, 595 P.2d 147 (Alaska 1979), *cert. denied* 444 U.S. 918 (1979), contraband was detected by an airline employee on February 25, 1977. He called Los Angeles police who observed the contraband, tested it, photographed it and removed some of it. The original package was resealed and placed on a flight to Anchorage. Without any surveillance of the package while it was on the airplane,

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[1] The Appellate Court of Illinois in its opinion incorrectly determined that an agent had to be observing the contraband every moment that it was in customs (Pet. Cert. 8a) or that the contraband had to be marked.

new officers met the airplane in Anchorage and took custody of the package. Thereafter, the officers made a controlled delivery to the defendant. Certainly, if such a procedure was proper in *Chapman*, *DeBerry*, and *McConnell*, then the procedure followed in the instant case was proper.

Respondent also suggests that because law enforcement officers allowed him to have physical possession of the package for thirty to forty-five minutes before arresting him there was no "controlled delivery in this case." (Resp. Br. 13-16) The facts, however, conclusively demonstrate that a controlled delivery did occur. After Officer Lipsek and Agent Labek delivered the package to respondent, Agent Labek saw respondent pull the package into his apartment while Officer Lipsek left to obtain a search warrant for the apartment. (R. 38) Agent Labek maintained surveillance within respondent's apartment building. During that time he saw respondent leave his apartment, walk down the common hallway and look out at the street through a hallway window. Thirty to forty-five minutes later, Agent Labek saw respondent push into the hall the same container which Labek had earlier delivered to respondent. (R. 32) At this point, Agent Labek arrested respondent. Later, at Chicago Police Headquarters when the container was opened, Officer Lipsek was present. Both Officer Lipsek and Agent Labek testified that the metal container was the same one they personally delivered to respondent at his apartment earlier that same day. (R. 32, 37-38)

Customs situations involving the controlled delivery of a previously searched object and a subsequent retaking and search of that object are not unique. This Court has never required law enforcement officials to maintain

constant physical possession or surveillance after an initial search and seizure of an object to later search or seize that object without a warrant. *See*: *United States* v. *Edwards*, 415 U.S. 800 (1974); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). In *United States* v. *Pringle*, 576 F.2d 1114 (5th Cir. 1978), a controlled delivery of heroin was made to defendants after a lawful customs inspection revealed that the package contained heroin. Agents replaced most of the heroin and inserted a beeper into the package. The package was delivered to and accepted by defendant Pringle at his home while government agents kept the premises under surveillance. Twenty minutes after the defendant accepted the package a second person, Elston, arrived. After arriving at Pringle's home, Elston was observed by agents peeking through the drawn blinds several times. He then left the house ten minutes later and the agents noticed a bulge beneath his jacket. The agents followed Elston's car and heard the signal from the beeper weaken as Elston drove away. They concluded Elston had the package. They stopped the car and seized the package in plain view.

There is a striking similarity between the facts in *Pringle* and the facts in the case at bar. In both cases the packages were examined pursuant to a lawful customs examination and were determined to contain contraband. In both situations a controlled delivery was made. In both situations the agents maintained surveillance of the premises and the package was in the physical possession of the defendant for approximately thirty to forty minutes, before the agents regained possession. While the agents did utilize a beeper device in *Pringle* to track the whereabouts of the heroin after defendant

Elston left with the package, in the instant case the agents testified that the container which they delivered to respondent was the same container that respondent pushed into the hallway. In the instant case, the respondent was arrested immediately after entering the hallway with the container and there is no question that the container recovered was the same container delivered by the agents to respondent.

In *United States* v. *Washington,* 586 F.2d 1147 (7th Cir. 1978), a controlled delivery of a package containing cocaine was made by agents following a lawful customs inspection of the package. One of the defendants carried the package into a house out of the sight of the agents. About five minutes later, several of the defendants left carrying a black plastic bag containing an object with the same size and dimension as the package. The defendants got into a Cadillac, drove to a restaurant, returned to the house, then drove from Quincy, Illinois, to Missouri and then to Iowa. The package was obviously out of the agent's view at all times. A beeper inserted into one of the objects in the package emitted a signal which the agents intercepted. Then, the Cadillac passed a truck and became lost from the agents' view. The agents could not find the Cadillac but received strong signals from the beeper. The Cadillac and the defendants were found later. The beeper and the object into which it had been inserted were found next to a creek bed. The black plastic bag was found in the Cadillac. It is obvious that as in the instant case the package containing the contraband was out of the sight of the agents conducting the surveillance for a period of time and in fact, in *Washington,* was not even recovered from defendants at the time of arrest. In *Washington*, the district court and the

court of appeals found that, based on the foregoing evidence, defendants were guilty beyond a reasonable doubt, and that the defendants' motions to suppress were properly denied. In the instant case, the respondent's guilt has yet to be determined, but certainly if the facts in *Washington* permit a denial of the motion to suppress and sustain a finding of guilt, then the highly similar facts of the instant case require a denial of respondent's motion to suppress.

Defendant's reliance on *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979) (Resp. Br. 10, 12) is misplaced. In *Edwards* the First Circuit Court of Appeals stated in *dicta* that law enforcement officials had relinquished "dominion and control" over a package by allowing defendant to transport the package by bus and car while followed by officers but out of the officers' control for over one hour. Were the *dicta* in the opinion in *Edwards* to be followed, law enforcement officials could never use a controlled delivery as a method of apprehending others who might be involved in a joint criminal enterprise with the person who initially receives the package which is the subject of the controlled delivery. In any event in the case at bar, Agent Labek never left the premises of respondent's apartment building during the entire period of the controlled delivery and did maintain reasonable, continuous surveillance.

Indeed, in the case at bar, the law enforcement officials were acting reasonably by allowing respondent to take the package into his apartment. This procedure allowed respondent to exercise additional control over the package beyond mere acceptance which could facilitate prosecution for the offense of possession. Ill. Rev. Stat. 1979, ch. 56½, sec. 704(e), sec. 705(e). Further, allowing respondent to take the package into his apartment increased the offi-

cers' chances of apprehending others involved in the criminal enterprise. *United States* v. *Pryba*, 502 F.2d 391 (D.C. Cir. 1974). All of the activities of the officers and agents in the instant case were consistent with the controlled delivery the agents were making. Finally, it should be noted that in a good faith attempt to comply with the law one of the officers left to obtain a warrant to enter the apartment when it became apparent that respondent was going to take the package into the apartment. It would surely be anomalous to interpret the fourth amendment to penalize the good faith acts of law enforcement officers in this case because they refrained from entering respondent's home without a warrant, and instead waited in the hallway keeping the apartment under surveillance until respondent fortuitously emerged with the container.

While recognizing the alternative extended border search argument made by the Solicitor General in his *amicus curiae* brief, the petitioner maintains that a controlled delivery was made in the instant case. The package, while it may have been out of the agents' physical possession for a short period of time, was always under their control. While it may have been prudent for Officer Lipsek to leave to obtain a warrant to enter respondent's home and regain possession of the container, the need for the warrant was obviated when Agent Labek saw respondent push the container into the common hallway. *See, Payton* v. *New York*, 445 U.S. 573 (1980).

Respondent additionally argues that there is "no need for a 'controlled delivery' exception to the warrant requirement." (Resp. Br. 16) Respondent has attempted to portray this as a new argument but it is merely a reiteration of his earlier argument that *Chadwick, supra*, requires the issuance of a warrant for the government to

open the container once it has come into respondent's possession. Yet, respondent has identified an "exception" to the warrant requirement which really is not an exception at all. Respondent forgets that unlike the package in *Chadwick,* the instant package was the subject of an initial, lawful customs inspection at which time the contraband was discovered. *United States* v. *Ramsey,* 431 U.S. 606 (1977). The package was then the subject of a controlled delivery by agents who maintained surveillance in respondent's apartment building, the same agents who reopened the package without a warrant. Every action taken by the agents was proper, and acceptance of the respondent's argument that a warrant was necessary to reopen the container trivializes the fourth amendment, because here the agents already knew that contraband was in the package due to the prior lawful, customs inspection.

Respondent also fails to recognize that the contraband which was seized and inspected at customs was contraband *per se,* and both the contraband and its container was subject to forfeiture under the provisions of 21 U.S.C. sec. 881(a)(1)(2)(3) and (f). In *United States* v. *Johnson,* 572 F.2d 227 (9th Cir. 1978), *cert. denied,* 437 U.S. 907 (1978), the ninth circuit upheld a second warrantless search of an automobile that had been in police custody for two weeks following the initial confiscation and search of the vehicle, pursuant to forfeiture statutes, which had revealed nothing. Clearly, if the second warrantless search of the vehicle in *Johnson* was proper after two weeks, then the second warrantless search of the container in the instant case, which was opened at police headquarters, shortly after the respondent's arrest, was proper. Moreover, in *Johnson,* after the vehicle was searched the second time the

government released it to defendant rather than bringing forfeiture proceedings. It was enough that forfeiture proceedings could properly lie to justify the impoundment of the vehicle and the warrantless search. The same must be said about the instant facts.

In summary, no warrant was required to justify the reopening of a package which had been sent through customs. Respondent had no legitimate expectation of privacy in the package because it was the subject of a prior lawful customs inspection, which could properly be conducted at random, and a subsequent controlled delivery. Rather, as properly recognized by the majority of courts, the retaking and reopening of the package was merely the actual reassertion of physical possession over a package in which respondent never had a legitimate expectation of privacy. Therefore, the subsequent reopening of the package at police headquarters was proper, since respondent had no rights in the package protected by the fourth amendment, and no warrant was required to justify the retaking and reopening of the package.

## CONCLUSION

For all the foregoing stated reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County, Illinois, for further proceedings.

Respectfully submitted,

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